No. 03-70674

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAUL MORALES-IZQUIERDO,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

RESPONDENT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

Creating both an inter-circuit and an intra-circuit split, a panel of this Court (D.W. Nelson, Reinhardt, Thomas) has erroneously struck down a regulation that is essential to the expeditious enforcement of our immigration laws and the government's ability to remove tens of thousands of illegal aliens per year. Accordingly, Respondent John Ashcroft respectfully petitions the Court to rehear this case en banc pursuant to Fed. R. App. P. 35 and Ninth Circuit Rule 35-1.

The regulation at issue (8 C.F.R. § 241.8) concerns repeat offenders of our immigration laws. Specifically it prescribes the procedures for summarily reinstating a prior order of removal against an alien who has entered the United States unlawfully after previously having been removed (or having voluntarily departed) under a removal order. This regulation is fully consistent with the Immigration and Nationality Act's ("INA's") reinstatement provision, Section 241(a)(5) (8 U.S.C. § 1231(a)(5)), which provides for reinstatement of a prior removal order in these circumstances. Nonetheless, confusing reinstatement orders with removal orders, the panel held that the summary reinstatement procedure is ultra vires, and that full removal proceedings before an immigration judge are required before the government can enter a reinstatement order.

There are three reasons why this Court should grant rehearing en banc. First, as the panel itself has acknowledged, its decision squarely conflicts with the decision by the First Circuit in Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004), the only other circuit to decide the validity of the summary reinstatement procedure in light of

Section 240. Contrary to the panel's decision the First Circuit has ruled that the INA is ambiguous about the procedures for issuing a reinstatement order and the summary procedure prescribed by 8 C.F.R. § 241.8 is a reasonable interpretation of ambiguous statutes.

Second, the panel's decision is inconsistent, or in considerable tension, with rulings by this Court that a reinstatement order is not a removal order. See Castro-Cortez v. Reno , 239 F.3d 1037, 2044 (9th Cir. 2000) (Canby, Reinhardt, Fernandez); Arreola-Arreola v. Ashcroft, 383 F.3d 965, 958 (9th Cir. 2004) (Pregerson, Beam, Paez). The panel's decision is also in tension with decisions holding that no second hearing before an immigration judge is required to reinstate a prior removal or deportation order, because the alien already had a right to a hearing to decide whether the prior order should issue in the first instance. See, e.g., Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169, 1174-75 (9th Cir. 2001) (Fernandez, Rymer, Wardlaw); United States v. Luna-Madellaga, 315 F.3d 1224, 1226-27 (9th Cir. 2003) (Rymer, Thomas, Silverman).

Third, the panel's decision has a significant adverse impact on the Government's ability to remove tens of thousands of illegal aliens in the Ninth Circuit without undue delay. The reinstatement procedure which has been struck down is the means by which the Government removed over 98,000 illegal aliens in the Ninth Circuit in the last three years – 42,000 illegal aliens in 2004 alone. The reinstatement procedure accounts for 40% of all removals nationwide, and two-thirds of nationwide reinstatements take place in the Ninth Circuit. The decision

precluding reinstatement of violated removal orders except in full-blown removal proceedings threatens to clog crowded immigration judge dockets, stretch the Government's detention capacity for illegal aliens, and could cause the release of thousands of illegal aliens from detention pending completion of their removal proceedings, who are then likely to abscond. Given these conflicts and impacts, this case warrants rehearing en banc.

STATEMENT OF THE ISSUE

Whether reinstatement of a prior order of removal under Section 241(a)(5) is statutorily required to take place under the formal removal procedures authorized by Section 240 for issuing a removal order in the first instance, making the summary reinstatement procedures at 8 C.F.R. § 241.8 ultra vires to Section 240.

STATEMENT OF THE CASE

1. The Statutes.

A. INA Section 240. Section 240 entitled "Removal proceedings" provides in pertinent part:

> **(a) Proceeding**
> **(1) In General**
> An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.
> **(2) Charges**
> An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title [8 U.S.C. § 1182] or any applicable ground of deportability under section 1227(a) of this title [8 U.S.C. § 1227(a)].
> **(3) Exclusive procedures**
> Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States, or if the alien has been so admitted removed from the United States. Nothing in this section shall affect proceedings conducted

pursuant to section 1228 [8 U.S.C. § 1228][expedited removal proceedings for aliens convicted of aggravated felonies].
* * *
(c) Decision and Burden Of Proof
(1) Decision
(A) In General
At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.
* * *
(e) Definitions
***
(2) Removable
The term "removable " means - - -
(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title [8 U.S.C. § 1182], or
(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title [8 U.S.C. § 1227].

8 U.S.C. §§ 1229a(a)(1)-(3), (c)(1)(A), (e)(2). Thus, the title and plain language of Section 240 create a "removal proceeding" to be conducted by an immigration judge, the stated function of which is to adjudicate charges of an alien's "inadmissibility" under 8 U.S.C. § 1182(a) (listing grounds for refusing to admit an alien to our country) or "deportability" under 8 U.S.C. § 1227(a) (listing grounds for deporting an alien already admitted). The decision or order authorized by Section 240 is a decision whether an alien is "removable, " expressly defined as meaning "inadmissible" or "deportable" under sections 1182 and 1227.[1] Section 240 gives

[1] Section 240 was enacted by Congress in the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA") to combine the functions of former exclusion proceedings for deciding whether aliens at our borders seeking admission were "excludable" (now termed "inadmissible"), and deportation proceedings to decide whether aliens present in our country were "deportable " and were to be physically expelled.

aliens the privilege of being represented by counsel at the alien's own expense and a "reasonable opportunity" to present examine evidence and cross-examine witnesses. 8 U.S.C. § 1229a(b)(4). By regulation, aliens may apply for various waivers and forms of relief from removal authorized by other sections of the INA, and have a right to an administrative appeal to the Board of Immigration Appeals. 8 C.F.R. §§ 1003.1(b)(3); 1240.1(a)(1)(ii) and (iii); 1240.11 and .15. A final order of removal is reviewable in the courts of appeals. 8 U.S.C. § 1252. An exclusivity provision mandates that unless stated elsewhere in the INA, formal removal proceedings are to be the "sole and exclusive" procedures for deciding "whether an alien may be admitted . . . or if admitted, removed." 8 U.S.C. § 1229a(a)(3). This provision is immediately proceeded by Sections 240(a)(1) and (2), which require the filing and adjudication of charges of inadmissibility or deportability in formal removal proceedings. Thus, read in context, the exclusivity provision pertains to the procedures for adjudicating an alien's inadmissibility or deportability and issuing an order of removal in the first instance.[2]

B. INA Section 241(a)(5). Section 241(a)(5) by contrast, provides for a

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[2] Apart from Section 240, three other provisions of the INA expressly create procedures for adjudicating an alien's legal inadmissibility or deportability and whether he should be ordered removed from this country in the first instance. See 8 U.S.C. 1225(b)(1) (summary procedure and removal order by an immigration officer for an arriving alien who is "inadmissible " under section 1182 for fraud or lack of valid travel documents); 8 U.S.C. 1225(c) (summary procedure and removal order by an immigration officer or immigration judge if an alien is suspected of being "inadmissible " under section 1182's terrorism grounds); 8 U.S.C. 1228(b)

different type of proceeding. This section entitled "Reinstatement of removal orders against aliens illegally reentering" states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under [the INA], and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5). In contrast to the plain language of Section 240 – which establishes removal proceedings for judging an alien's inadmissibility or deportability and whether he may be removed from the country in the first instance – the plain text of Section 241(a)(5) creates a reinstatement proceeding for reenforcing a prior removal order in which an alien's inadmissibility or deportability has already been determined and he has already been ordered removed. Unlike the text of section 240, the text of Section 241(a)(5) contains no language authorizing the adjudication of charges of inadmissibility or deportability, which is the express function of a Section 240 removal proceeding and removal order. Rather, the plain text of Section 241(a)(5) simply authorizes a process akin to a civil enforcement action, reinstating and reenforcing a prior civil judgment (judgment of inadmissibility or deportability) and order (prior removal order). Also, in contrast to the plain language of Section 240, which authorizes an "immigration judge" to initially decide inadmissibility or deportability and issue a removal order, the plain language of Section 241(a)(5) authorizes "the Attorney General" to issue a reinstatement order. And in contrast to Section 240, which creates proceedings that by regulation have opportunities to apply for relief, reopening and further

administrative review, the plain language of Section 241(a)(5) prohibits such opportunities. Thus, a comparison of the plain language of Sections 240 and 241(a)(5) shows that these sections pertain to different proceedings and orders, by different officials, with different opportunities to apply for relief, reopening and review.

Congress enacted Section 241(a)(5) in IIRIRA to replace the former reinstatement provision that was repealed by IIRIRA (INA Section 242(f), 8 U.S.C. § 1252(f) (1994)). See Lattab, 384 F.3d at 12. In enacting new Section 241(a)(5), Congress made several substantive changes to the former reinstatement statute. Id. Among other things, Congress added new statutory language to Section 241(a)(5) prohibiting applications for relief, as well as reopening or review of the prior removal order. Id. This changed pre-IIRIRA law and procedures, which pursuant to regulations took place in deportation proceedings before an immigration judge and thereby gave aliens opportunities to apply for relief and reopening or review of the prior order. See former 8 C.F.R. §§ 242.17, .21-23 (1996); Matter of Malone, 11 I & N Dec. 730, 731 (BIA 1966). Thus, new language in Section 241(a)(5) expressly prohibits opportunities formerly available under the Attorney General's pre-IIRIRA procedures for reinstating prior orders in deportation proceedings before immigration judges. Legislative history shows that Congress was dissatisfied with the pre-IIRIRA reinstatement process which had fallen into disuse and wanted reinstatements to be immediate. Lattab, 384 F.3d at 18. Congress explained: "if aliens who are ordered removed . . . seek reentry they are subject to immediate

removal under the prior order." Id., quoting H.R. Rep. No. 104-469, pt. 1 at 13 (1996) (emphasis added).

After Congress changed the reinstatement provision and enacted Section 241(a)(5), the Attorney General changed the procedures for reinstating and reenforcing prior orders against recidivist aliens. Instead of reinstatements in formal immigration proceedings before an immigration judge, which was the pre-IIRIRA procedure, the Attorney General authorized summary reinstatement procedures by an immigration officer outside removal proceedings (8 C.F.R.§ 241.8).[3] Under the current procedures reinstatement of a prior removal order can be accomplished in one day. The alien can obtain direct judicial review of the reinstatement order in the courts of appeals pursuant to 8 U.S.C. § 1252, see Castro-Cortez, 239 F.3d at 1044, and can collaterally challenge the legality of the prior removal proceeding and order that has been reinstated by filing a petition for habeas corpus in district court. Arreola-Arreola, 383 F.3d at 963.

2. The Facts.

Morales-Izquierdo ("Morales") illegally entered the United States in 1990. Four years later he was ordered deported in absentia after failing to appear at his deportation hearing. In 1998, the Government located Morales in California and

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[3] The immigration officer determines the identity of the alien, whether the alien has previously been deported, whether the alien illegally reentered the United States, and decides whether to issue a reinstatement order. Id. The alien with a prior removal order in which he had the opportunity for a hearing is not allowed a second formal hearing before an immigration judge. Id.

executed his deportation order. He illegally reentered the United States and, in 2001, applied for the relief of adjustment of status to that of a lawful permanent resident based on his marriage to a United States citizen. In 2003, when Morales and his wife appeared at to discuss adjustment of status, Morales was served with a denial of the application, along with a Notice of Intent To Reinstate his prior deportation order in accordance with Section 241(a)(5). Pursuant to that section and 8 C.F.R. § 241.8, an immigration officer found Morales was an alien subject to a prior deportation order, had been removed pursuant to that order, and had illegally reentered the United States. The immigration officer issued a reinstatement order, reinstating and reenforcing Morales' prior deportation order. Morales petitioned for review of the reinstatement order in the court of appeals.

3. The Panel 's Decision.

A panel of this Court unanimously granted the petition for review and construed the summary reinstatement procedures to be ultra vires to the procedures for conducting initial removal proceedings under Section 240. Morales-Izquierdo v. Ashcroft, 388 F.3d 1299 (9th Cir. 2004). Applying Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). the panel stopped at step one of the analysis, concluding that the summary reinstatement procedure is inconsistent with the plain language and structure of the INA. Id. at 1303, 1304. Contrary to the first rule of statutory construction, the panel never compared the plain language of Sections 240 and 241(a)(5) – which as shown above expressly describe different proceedings and orders, issued by different officials, with different

opportunities regarding relief, reopening and review. Instead, the panel referred to Section 240(a)(1),which provides that "[a]n immigration judge shall conduct all proceedings for deciding the inadmissibility or deportability of an alien," and Section 240(a)(2), which provides that "[a]n alien is inadmissible if he may be charged under 8 U.S.C. § 1182(a) and deportable if he may be charged under 8 U.S.C. § 1227(a)." Id. at 1303. The panel then concluded that based on his illegal reentry Morales could be charged with a new ground of inadmissibility under Section 1182(a) (being present in the United States in violation of law). Id. Accordingly, the panel reasoned that "the determination of whether an alien's prior deportation order should be reinstated is, in effect, a determination of whether that alien may be found inadmissible " – in other words that a reinstatement order is in effect a removal order. Id. at 1303. By construing a reinstatement order as the equivalent of a removal order, the panel held that Section 240's exclusivity provision controls reinstatement proceedings and requires them to take place in a formal removal proceeding before an immigration judge. Id.

Quoting an excerpt of 240's exclusivity provision providing that unless otherwise specified removal proceedings "shall be the sole and exclusive procedure for deciding if an alien may be admitted to the United States" – which does not accurately portray the full meaning of the provision – the panel concluded that the reinstatement statute "does not provide an alternate procedure for determining whether a reinstatement order should issue. " Id., quoting 8 U.S.C. § 1229a(a)(3). By relying on a selective excerpt rather than the full text of the exclusivity provision,

and ignoring the two provisions immediately preceding the exclusivity provision (see page 5 above), the panel misread that provision as requiring reinstatements to take place in initial removal proceedings under Section 240.

To bolster its decision the panel looked at three other sections of the INA that provide for expedited procedures for issuing a removal order adjudicating alien's inadmissibility or deportability and deciding whether the alien should be ordered removed. Id.; see note 2 supra. Overlooking that these statutes are inapposite to Section 241(a)(5) because they pertain to removal orders, not reinstatement orders like Section 241(a)(5), the panel's decision reasoned when Congress wanted to provide for alternative, expedited removal procedures it did so, and it had not provided for such procedures for reinstatements under Section 241(a)(5). Id. The panel also found it significant that the Attorney General's pre-IIRIRA reinstatement regulations permitted reinstatements to take place in deportation hearings before immigration judges. Id. Overlooking that the reinstatement statute, Section 241(a)(5), has new language taking away procedures or opportunities formerly available under the Attorney General's pre-IIRIRA procedures for reinstatements in deportation proceedings (opportunities to apply for relief and to reopening or review of the prior removal order), the panel's decision reasoned that if Congress had intended to change the former reinstatement procedures it would have specifically provided for an alternate procedure in the statute. Id. 1304.

Thus, the panel's decision held that the regulation authorizing summary reinstatements by immigration officers (8 C.F.R. § 241.8) is "in conflict with the

statute and, therefore, ultra vires to INA § 240(a)." Id. The panel's decision is based on a seriously flawed construction of the INA, which contrary to the ordinary rules of statutory construction: (1) fails to fully analyze and compare the plain language of Sections 240 and 241(a)(5); (2) relies on an excerpt of an exclusivity provision that does not reflect its true meaning, (3) overlooks new statutory language added to Section 241(a)(5) that takes away procedures or opportunities available under the Attorney General's former reinstatement procedures; (4) compares Section 241(a)(5) to inapposite removal sections of the INA with different stated functions; and (5) gives virtually no effect to legislative history. The panel's decision specifically noted that it creates a conflict with the First Circuit's decision in Lattab, which holds that the summary reinstatement is not ultra vires to Section 240, but "disagree[d] with the First Circuit's conclusion that the statute is ambiguous and Chevron deference to the agency's interpretation is therefore required." Id.

DISCUSSION

1. Direct Conflict With The First Circuit's Decision In Lattab. As the panel recognized, its decision creates a direct conflict with the First Circuit 's decision in Lattab. In that case the First Circuit correctly rejected a claim that the summary reinstatement procedures at 8 C.F.R. 241.8 are ultra vires to Section 240. Lattab, 348 F.3d at 18-19. The First Circuit applied Chevron but concluded that the statutes do not clearly and unambiguously answer what procedures are to be used to reinstate a prior removal order and ultimately deferred to the Attorney General's interpretation of ambiguous statutes. Id. Although the First Circuit acknowledged "a

veneer of plausibility" to the argument that reinstatement is to some extent a decision whether an alien may be removed, the First Circuit found this "easily pierced" and ultimately "uncertain" after considering Section 240 in the context of the INA as a whole. Id. at 18. The First Circuit explained that Sections 240 and 241(a)(5) have different functions, with "[S]ection 240. . . primarily concerned with proceedings to determine whether aliens are excludable or deportable on one of the bases enumerated in INA §§ 212 and 237, 8 U.S.C. §§ 1182 and 1227," while by "contrast, [S]ection 241 deals specifically with aliens who already have been ordered removed." Id. 18. The First Circuit also considered legislative history indicating that when Section 241(a)(5) was enacted in 1996, Congress "was dissatisfied with the performance of the prior reinstatement provision" which had fallen into disuse, and that Congress "apparently believed that the reinstatement regime should be altered dramatically," intending to strengthen the reinstatement provision and make it more efficient. Id. at 19. The First Circuit, however, also rejected the Government's argument that the reinstatement provision expressly mandates the use of summary procedures. Id. at 19.

After examining the statutory text, structure, and legislative history, the First Circuit found "the INA ambiguous with regard to the procedures to be used when the government, in the post-IIRIRA era, seeks to reinstate a prior removal order against an illegal reentrant" and moved to step two of Chevron. Id. at 19. Once at that stage the First Circuit had "little difficulty" concluding "that it is reasonable to interpret the INA, as amended [in 1996], as giving the government authority to craft a streamlined procedure for the reinstatement of earlier deportation orders." Id. at 20.

2. **Intra-Circuit Conflict/Tension**. The panel's decision construing a reinstatement order to in effect be a new finding of inadmissibility and removal order, see 388 F.3d at 1303, is in considerable tension with other decisions in the Circuit construing reinstatement orders and removal orders to be distinct from one another. See Castro-Cortez, 239 F.3d at 1044 (in jurisdictional ruling stating, "[r]einstatement orders are not literally orders of removal because the orders merely reinstate previously issued removal (or in these cases deportation and exclusion) orders"); Arreola-Arreola, 383 F.3d at 958 (stating that "while not literally an order of removal, the reinstatement order gives effect to the removal order. It reinstates the removal order."). The panel's decision is also in tension with this Court's decision in Alvarenga-Villalobos, in which the Court rejected that the Constitution requires reinstatements to take place in a second hearing before an immigration judge, reasoning that "aliens removable under § 241(a)(5) have already received all of the process that is due under the Constitution."[4] 271 F.3d at 1173. The Court in Alvarenga-Villalobos concluded that due process did not entitle the alien to another hearing:

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[4] In Alvarenga-Villalobos, the Court specifically rejected an alien's reliance on dicta in Castro-Cortez suggesting that the summary reinstatement procedure authorized by 8 C.F.R. § 241(8) facially violates due process. "We did not decide that the reinstatement procedures codified in the regulation did violate due process and we decline to do so now." Alvarenga-Villalobos, 271 F.3d at 1173-1174; see alsoLuna-Madellaga, 315 F.3d at 1226-27 (9th Cir. 2003). By contrast, the panel's decision relied in part on Castro-Cortez' dicta, without acknowledging that it was dicta or subsequently had been repudiated. See Morales-Izquierdo, 388 F.3d at 1304.

> [A]nother hearing is denied only to those aliens who have already been excluded, deported or removed after having been given one full and fair hearing, including the right to judicial review of that hearing. To preclude a second bite at the apple after an illegal reentry does not offend due process.

271 F.3d at 1174. Alvarenga-Villalobos was a constitutional holding and therefore not in direct conflict with the panel's statutory decision here. But it is in tension with the panel's decision, which appears to be founded on concerns about an alien's procedural rights to a hearing before an immigration judge. Morales-Izquierdo, 388 F.3d at 1304.

3. **Significant Adverse Impact**. As shown in the Introduction, the panel's decision affects tens of thousands of cases subject to reinstatement each year in the Ninth Circuit. In addition, the summary reinstatement procedures can be accomplished in a day. However, under the panel's decision, each one of these reinstatements now requires the initiation of a Section 240 removal proceeding (or one of the other alternate removal procedures, if applicable), with new charges of inadmissibility or deportability. This is anticipated to create a huge burden on government resources and to lead to the release of recidivist illegal aliens into the community during the pendency of their proceedings.

CONCLUSION

For the foregoing reasons the Court should vacate the panel's decision and rehear this case en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 03-70674

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Dated: January 24, 2005

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No. 03-70674

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAUL MORALES-IZQUIERDO
Petitioner

v.

JOHN ASHCROFT,
Respondent

APPEAL FROM ORDER REINSTATING ORDER OF DEPORTATION

PETITIONER'S REPLY TO GOVERNMENT'S PETITION FOR REHEARING

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This Court has held that Department of Homeland Security ("DHS") regulations, which allow an immigration officer to issue an order reinstating an alleged prior order of deportation, are inconsistent with INA §240, 8 U.S.C. §1229a; instead, the statute requires that reinstatement determinations must be made by an immigration judge. Morales-Izquierdo v. Ashcroft, 388 F.3d 1299 (9th Cir. 2004). Petitioner, Raul Morales, hereby submits the following brief in opposition to the Government's Petition for Rehearing.

I. SUMMARY OF THE ARGUMENT

This Court's decision is based primarily on the plain language of the statute and the structure of the legislation. 388 F.3d at 1305. Petitioner agrees that these considerations provide sufficient support for the Court's decision. However, several additional points that underlie this Court's decision but are not explicitly addressed provide further support for this Court's analysis.

First, there are additional statutory construction considerations that support this Court's decision: (1) an analysis of the specific changes in the reinstatement provision adopted by Congress in 1996 reveals Congressional acquiescence in the prior practice of requiring the immigration judge to make reinstatement decisions; (2) INA §235(a)(1), 8 U.S.C. §1225(a)(1) and prior administrative precedent support this Court's conclusion, 388 F.3d at 1303, that a reinstatement decision is in effect a determination of inadmissibility; (3) the doctrine of constitutional avoidance supports this Court's interpretation of the statute; and (4) the principle of lenity counsels against the Government's interpretation. These considerations

are "traditional tools" for statutory interpretation, see INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987); and all of these considerations taken as a whole establish that this Court's interpretation of the statute is correct.

Second, both this Court and the First Circuit in Lattab have recognized that there are serious due process problems with the reinstatement regulations. See Castro-Cortez v. Reno, 239 F.3d 1037, 1049 (9th Cir. 2000); Lattab v. Ashcroft, 384 F.3d 8, 21, n.6 (1st Cir. 2004). If, as the Government urges, this Court's statutory analysis is rejected, then the Court will have to address the serious due process claims raised by Petitioner, and the reinstatement regulations should be invalidated as a violation of due process.

Third, contrary to the Government's position, AG Brief, pp. 12-13, this Court's decision is not in "direct conflict" with Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004). In Lattab the First Circuit did not reach the petitioner's due process claim because he could not show prejudice. However, the court did indicate that if it had reached the due process claim, then it would have interpreted the statute as this Court has.

Fourth, this panel's decision is not "in considerable tension" with other decisions of this Circuit. AG Brief, pp. 14-15. To the contrary, other Ninth Circuit cases, especially Castro-Cortez v. Reno, 239 F.3d 1037 (9th Cir. 2000), provide support for this Court's decision.

Finally, although the "significant adverse impact" discussed by the

Government, AG Brief, p. 15, is not really relevant,[1] those concerns are in any case exaggerated. Requiring DHS to bring reinstatement cases before an immigration judge will not adversely affect the government's ability to remove from the United States those individuals who should under the law be removed.

II. LEGAL ARGUMENT

A. This Court's Interpretation of the Statute Is Correct.

As the Government apparently recognizes, AG Brief, p. 9, the first step in the Chevron analysis is to determine whether Congressional intent on the question at hand can be discerned. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843, n.9 (1984). Beyond the plain language of the statute and the structure of the legislation, relied upon by this Court, there are additional "traditional tools of statutory construction" that establish Congress' intention on this matter.[2]

1. Congressional Acquiescence. The amendments made by IIRIRA reveal

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[1] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842. The alleged fact that applying the statute is inconvenient for the government, or that there is a "significant adverse impact" on other governmental activities, is not a basis for concluding that the Congressional intent does not have to be followed. If there is a "significant adverse impact", it is Congress - not the agency - that must change the law.

[2] Where a court interprets the statute according to these traditional tools of statutory interpretation, "there is, for Chevron purposes, no ambiguity in such statute for an agency to resolve". INS v. St. Cyr, 533 U.S. 289, 320, n. 45 (2001).

that Congress did not intend to change the reinstatement procedures, but rather acquiesced in the prior practice according to which reinstatement decisions were made by the immigration judge. The grammatical structure of old §242(f) and new §241(a)(5) is the same. The old reinstatement provision reads as follows:

> If the Attorney General finds:
> (1) an alien was ordered deported on certain criminal grounds of deportation;
> (2) the alien departed or was deported under the order of deportation; and
> (3) the alien unlawfully reentered the United States;
>
> then (1) the prior order shall be reinstated from the original date; and
> (2) the alien shall be deported at any time.

INA §242(f), 8 U.S.C. §1252(f) (1995). The structure of the amended provision is the same:

> If the Attorney General finds:
> (1) an alien was ordered removed (on any grounds);
> (2) the alien departed or was removed under the order of removal; and
> (3) the alien unlawfully reentered the United States;
>
> then (1) the prior order is reinstated from the original date;
> (2) the prior order is not subject to being reopened or reviewed;
> (3) the alien is not eligible for any relief under the Act;
> and (4) the alien shall be removed at any time.

INA §241(a)(5), 8 U.S.C. §1231(a)(5). What Congress intended to do is make the antecedent factual basis for reinstatement broader (more individuals are now subject to reinstatement), and the consequences of reinstatement more severe (if the three required findings are made, then the person is not eligible to apply for relief from removal). There is no indication to suggest that the process of bringing a reinstatement case before the immigration judge should be changed.

This conclusion is supported by the amendments made to the provisions governing immigration court proceedings, now codified at INA §240(a), 8 U.S.C. §1229a(a). Prior to the amendments made by IIRIRA, the statute read as follows:

> A special inquiry officer [immigration judge] shall conduct proceedings under this section to determine the deportability of any alien . . .. Except as provided in section 242A(d) [judicial deportation for individuals convicted of certain crimes], the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.

INA §242(b), 8 U.S.C. §1252(b) (1995). In 1996 Congress amended this provision to correspond to IIRIRA's change in terminology from "deportation" to "removal". See IIRIRA, Pub.L. No. 104-208, 110 Stat. 3009, § 309(d)(2) (1996); Calcano-Martinez v. INS, 533 U.S. 348, 350, n. 1(2001). Thus, the new provision reads, in relevant part, as follows:

> An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien. . . . Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.

INA §240(a), 8 U.S.C. §1229a(a). Prior to IIRIRA, the statute was interpreted to require a hearing before the immigration judge. According to the regulations:

> In the case of an alien within the provisions of section 242(f) of the Act, the order to show cause shall charge him with deportability under section 242(f) of the Act. . . .
>
> If deportability as charged in the order to show cause is established, the Immigration Judge shall order that the respondent be deported under the previous order of deportation in accordance with section 242(f) of the Act.

8 C.F.R. §242.23(a), (d). Congress was fully aware of this process and did not indicate that this process should be changed. When Congress has chosen to

provide for removal decisions made outside of immigration judge proceedings, it has done so explicitly. See, e.g. INA §235(b), 8 U.S.C. §1225(b); INA §238(b), 8 U.S.C. §1228(b). According to well established principles of statutory interpretation, the amendments made in §241(a)(5) and §240(a) reflect Congressional acquiescence in the prior administrative practice. "Had Congress intended to change the reinstatement procedures by eliminating the alien's right to appear before an IJ and contest the reinstatement order, it undoubtedly would have done so." Casto-Cortez, 239 F.3d at 1948, n. 13. See also Edwards v. INS, 393 F.3d 299, 310 (2d Cir. 2004) ("Congressional reenactments, when made in the light of administrative interpretations of this kind go a long way to precluding the INS's current contention").

2. INA §235(a) and Administrative Precedent. According to INA §235(a)(1), 8 U.S.C. §1225(a)(1), any person present in the United States who has not been admitted is "deemed for purposes of this Act an applicant for admission." When an immigration officer reinstates a prior order of deportation, the officer determines that the person may not be admitted to the United States. In addition, a person present in the United States who has filed an application for adjustment of status, as Mr. Morales has, is assimilated to the position of one seeking admission to the United States. See Matter of Rainford, 20 I&N 598, 601 (BIA 1992). A decision to reinstate, which is effectively a decision to deny the application for adjustment of status, constitutes a denial of admission. Therefore, the reinstatement decision is subject to the section 240 procedures. See INA 240(a)(3)

(sole and exclusive procedure "for determining whether an alien may be admitted to the United States"). The Government's argument, AG Brief, pp. 5-7, that the order of reinstatement is "a different type of proceeding" from a proceeding to decide "inadmissibility or deportability", is not correct.

3. The Doctrine of Constitutional Avoidance. There is no doubt that there are serious constitutional problems with the Government's reinstatement process. See, e.g. Castro-Cortez, 239 F.3d at 1048 ("The reinstatement process raises very serious due process concerns"). As argued below, if this court reaches the merits of the constitutional claim, it should find that the Government's reinstatement process violates due process.

The Supreme Court has instructed:

> if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.

St. Cyr, 533 U.S. at 299-300. Hence, even if the Government's interpretation of the statute is "otherwise acceptable", there is an alternative that is "fairly possible" and that avoids the serious due process problems that arise under the Government's interpretation. Thus, this Court is "obligated to construe the statute" as it has. See Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("it is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided").

4. Principle of Lenity. Finally, in case there is any lingering doubt about Congress' intention, Congress legislates against a background in which any ambiguities in a statute are to be interpreted in favor of the alien. See, e.g. Cardoza-Fonseca, 480 U.S. at 449 ("longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); Costello v. INS, 376 U.S. 120, 128 (1964) ("accepted principles of statutory construction in this area of law to resolve that doubt in favor of the petitioner"). This principle also supports this Court's interpretation of the statute.

B. The Government's Reinstatement Procedures Violate Due Process.

To date, this Court has avoided addressing the due process claims raised by Petitioner, at least in part because there has been no dispute concerning the underlying factual allegations. See, e.g. Castro-Cortez, 239 F.3d at 1050; Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169, 1174 (9th Cir. 2001); Padilla v. Ashcroft, 334 F.3d 921, 924 (9th Cir. July 1, 2003). In this case, the factual allegations against Mr. Morales are disputed.[3] Given a fair hearing, he would be able to convince a neutral decision maker that the factual predicates necessary for reinstatement under INA §241(a)(5), 8 U.S.C. §1231(a)(5), are not present.

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[3] For example, DHS has alleged that a prior order of deportation was entered against Mr. Morales on April 27, 1995 and he was removed from the United States on January 3, 1998. Administrative Record ("AR"), p. 4. However, there is no evidence in the record of an order of deportation entered on April 27, 1995. DHS apparently means to argue that there was another *in absentia* hearing held against Mr. Morales. But Mr. Morales never received notice of such a hearing. Moreover, Mr. Morales maintains that the alleged deportation on January 3, 1998 was in fact a voluntary departure. See Declaration of Patricia and Raul Morales, previously submitted, ¶6-7 (attached hereto as Appendix A).

Furthermore, based on his six year marriage to a U.S. citizen, Mr. Morales is eligible for adjustment of status under INA §245(i), 8 U.S.C. §1255(i) (allowing individuals such as Mr. Morales to apply for adjustment of status if the visa petition was filed prior to April 30, 2001). Under Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), petition for rehearing denied, if a discretionary waiver of the alleged prior deportation is granted then Mr. Morales can be approved for adjustment of status. 379 F.3d at 795-796. Mr. Morales claims that as a matter of due process, the decisions regarding disputed factual allegations and the discretionary decisions whether to grant a waiver and approve adjustment of status cannot be made by an immigration officer acting pursuant to DHS's reinstatement regulations.

There is no doubt that Mr. Morales is entitled to due process in any proceeding in which the government attempts to remove him from the United States. See, e.g. Getachew v. INS, 25 F.3d 841, 845 (9th Cir.1994). The reinstatement procedures used by the Government, see 8 C.F.R. §214.8, violate due process in the following ways:

(1) Under the DHS's reinstatement regulations, there is no meaningful opportunity to review the prior deportation file and respond to adverse evidence. See 8 C.F.R. §214.8. For example, although Mr. Morales maintains that he was not ordered removed as alleged by DHS, and that he was not deported from the United States on January 3, 1998, as alleged by DHS, see AR 4, Mr. Morales was not allowed an opportunity to respond to the Government's allegations and present

evidence support of his claims. See Declaration, ¶12. This is a violation of one of the most basic principles of due process. See, e.g., Greene v. McElroy, 360 U.S. 474, 496 (1959) ("the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue"); Gonzales v. United States, 348 U.S. 407, 415 (1955) (a person must have an opportunity to respond "based on all the facts in the file and made with awareness of the recommendations and arguments to be countered"); United States v. Segal, 549 F.2d 1293 (9th Cir. 1977) (minimal due process includes disclosure of the adverse evidence and an opportunity to be heard and present evidence).

(2) DHS uses its reinstatement regulations so that people can be removed from the United States in one day. See AG Brief, p. 15. As a practical matter, there is no opportunity to obtain the assistance of counsel under these circumstances. See Declaration, ¶12. The DHS's reinstatement regulations violate due process by not allowing for individuals to obtain the assistance of counsel. See, e.g. Baires v. INS, 856 F.2d 89, 91, n.2 (9th Cir. 1988) ("We have characterized the alien's right to counsel of choice as 'fundamental' and have warned the INS not to treat it casually"); Castro-O'Ryan v. INS, 847 F.2d 1307, 1313 (9th Cir. 1988) (the right to counsel is "indispensable and missing in totalitarian countries"); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) ("clear statutory mandate" for a right to counsel of his own choice).

(3) Although Mr. Morales disputes the factual allegations made in the Notice of Reinstatement, because there is no opportunity to respond to the

allegations, there is not an adequate administrative record for judicial review. The problem faced by Mr. Morales in responding to the government's allegations is similar to the problem legalization applicants faced in Haitian Refugee Center v. Nelson, 694 F.Supp. 864 (S.D.Fla. 1988), aff'd 872 F.2d 1555 (11th Cir. 1989), aff'd sub nom. McNary v. Haitian Refugee Center, 498 U.S. 479 (1991), where the Supreme Court affirmed an order requiring the Immigration Service to allow applicants an opportunity to respond to adverse evidence and develop an administrative record. According to the Court, otherwise "meaningful judicial review of their statutory and constitutional claims would be foreclosed". 498 U.S. at 484. Similarly, this court should find that INS's reinstatement procedures violate due process in that an adequate record for judicial review is not created.

(4) DHS's failure to provide for a neutral adjudicator to resolve disputed questions of fact constitutes a violation of due process. See United States v. Segal, 549 F.2d 1293 (9th Cir. 1977) (in the context of probation revocation, minimal due process requires a neutral and detached tribunal). In addition, a meaningful opportunity to be heard presupposes that the hearer will have the ability and competence to adequately judge the claims presented. Immigration judges are attorneys. 8 C.F.R. §1.1(l). In contrast, immigration officers are not attorneys, and are not even required to have a college education. For this reason alone, even if these immigration officers, whose main job is to seek and deport immigrants, are not biased they are not adequate decisionmakers.

(5) Finally, as a matter of minimal due process, an individual who is subject

to reinstatement of an alleged prior order of deportation must be given notice of the opportunity for judicial review. This Court has repeatedly held that the failure to advise a person of the right to judicial review constitutes a violation of due process. See United States v. Lopez-Vasquez, 1 F.3d 751 (9th Cir. 1993); United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1017 (9th Cir. 1993) (same)..

C. There Is No "Direct Conflict" With *Lattab*.

The Government's claim that there is a "direct conflict" between this Court's decision and Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004), AG Brief, pp. 12-13, is not correct. In Lattab, the First Circuit rejected the Government's argument that §241(a)(5) establishes an explicit congressionally sanctioned alternative to removal proceedings before an immigration judge. According to the First Circuit:

> The text of section 241(a)(5) simply will not bear the weight that the Attorney General tries to pile upon it. To say, as does section 241(a)(5), that an alien "shall be removed under the prior order at any time after ... reentry" says nothing about how the government may go about determining either the existence of a prior order or the fact of an illegal reentry. . . . [W]e should not read that section as evincing congressional intent to mandate summary procedures for reinstating prior deportation orders.

384 F.3d at 19. The question for the First Circuit was whether the government's interpretation of the statute was reasonable. 384 F.3d at 19-20. That question must, the First Circuit recognized, take into account the issue of the constitutionality of the government's procedures.

> If a constitutional challenge of this sort [due process] were to hold water, that doubtless would affect our judgment on the second step of the Chevron pavane. An interpretation of a statute that is unconstitutional, is by definition unreasonable . . ..

384 F.3d at 20, n. 5. The court in Lattab did not reach the constitutional due process issue because the petitioner was not contesting the underlying factual allegations and could not show prejudice from any due process violation. Id. at n. 4. Nonetheless, the court continued:

> Although this case does not provide a vehicle for testing the merits of the constitutional claim, we do not mean to imply that the claim is insubstantial. The summary reinstatement process offers virtually no procedural protections. . . . While judicial review of reinstatement orders is available in the courts of appeals, see 8 U.S.C. § 1252, that review may not be adequate when the alien has not been given a meaningful opportunity to develop an administrative record.

384 F.3d at 21, n. 6.[4] Thus, there is every indication that if the Lattab court had reached the due process claim (for example if the facts of Mr. Morales had arisen in the First Circuit), then the court would have reached the same result that this Court did.

D. This Court's Decision Is Not In "Considerable Tension" with Other Ninth Circuit Decisions.

Contrary to the assertions made by the Government, AG Brief, p. 14, this panel's decision is not "in considerable tension" with other decisions of this

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[4] The First Circuit's refusal to consider the petitioner's constitutional argument is inconsistent with the Supreme Court's decision in Clark v. Martinez, 125 S.Ct. 716 (2005) . According to the Supreme Court:

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail--whether or not those constitutional problems pertain to the particular litigant before the Court.

125 S.Ct. at 724.

Circuit. In Castro-Cortez, this Court specifically recognized the serious due process problems with the government's reinstatement procedures. See 239 F.3d at 1049-50. The Castro-Cortez court avoided the serious due process problems by interpreting the statute to preclude retroactive application of §241(a)(5). The approach taken by Castro-Cortez - interpreting the statute in a manner that avoids the "serious constitutional problem", 239 F.3d at 1050 - is perfectly consistent with this Court's applying the same rule of statutory interpretation to avoid the same due process problems.

Furthermore, Castro-Cortez held that an order of reinstatement is deemed to be the functional equivalent of a "final order of removal" for purposes of judicial review. 239 F.3d at 1044 (although a reinstatement order is not literally an order of removal, the reinstatement order is treated as an "order of removal" under the statute and is subject to judicial review under INA §242). See also Arevalo v. Ashcroft, 344 F.3d 1, 9 (1st Cir. 2003) ("The reinstatement itself operates as the functional equivalent of a final order of removal"). If the reinstatement order is an "order of removal" for purposes of INA §242, then there is no "tension" in requiring the reinstatement order to be issued by an immigration judge under INA §240, as is required for other orders of removal.

Nor is this panel's decision "in tension" with Alvarenga v. Ashcroft, 271 F.3d 1169 (9th Cir. 2001). Alvarenga sought only to collaterally attack the prior order; he did not dispute the underlying factual allegations and the court did not address the due process claims that arise in this case. See 271 F.3d at 1174.

E. The Government's Claim of "Significant Adverse Impact" Is Exaggerated.

A reinstatement case brought before an immigration judge can be handled expeditiously. If the immigration judge determines that the person is in fact subject to reinstatement, he or she can pretermit a request for "any relief" and immediately order the person to be removed. As the Attorney General is fond of asserting, any appeal to the Board can be streamlined. See, e.g. 67 Fed. Reg. 54878, 54881 (August 26, 2002). The purposes that Congress had in enacting §241(a)(5) can be achieved in a "streamlined, but fair, removal process" held before an immigration judge. The Attorney General provides no valid reason for failing to comply with the clear and unambiguous statutory language requiring a hearing held pursuant to §240.

CONCLUSION

For the foregoing reasons, the Government's Petition for Rehearing should be denied.

Dated this 16th day of March, 2005.

Robert Pauw
Attorney for Raul Morales

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32-1

I certify that the foregoing brief is double-spaced (excluding footnotes, quotations and headings); is printed using a proportionately spaced 14 point Times New Roman typeface; and contains less than 4200 words (not including the table of contents, table of authorities, and relevant certificates).

R Perry

CERTIFICATE OF SERVICE

I, GERMAN R. MOORE-RODRIGUEZ, hereby certify that I served a copy of the foregoing documents on the following persons:

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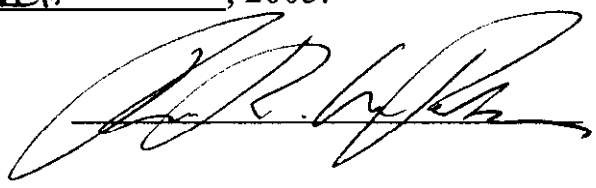
Dated this 16TH day of MARCH, 2005.



No. 03-70674

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Raul MORALES-IZQUIERDO,

Petitioner,

v.

Michael CHERTOFF,

Respondent.

ON REVIEW FROM A DECISION OF THE FORMER IMMIGRATION AND NATURALIZATION SERVICE

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S OPPOSITION TO RESPONDENT'S PETITION FOR PANEL AND *EN BANC* REHEARING

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I. STATEMENT OF AMICI CURIAE AND INTRODUCTION

Amici Curiae American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) proffer this brief in support of Petitioner's opposition to Respondent's petition for panel and *en banc* rehearing in *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004). Consistent with congressional intent, the decision ensures that basic procedural safeguards are met before an individual can be removed from the country pursuant to §241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. §1231(a)(5).

The Court correctly found that Congress intended immigration judges to continue to determine removability under INA §241(a)(5) as they had been doing for 45 years under the predecessor reinstatement statute, former INA §242(f), 8 U.S.C. §1252(f) (1995), 8 C.F.R. §242.23 (1995). Thus, the Court correctly concluded that the contrary regulation at 8 C.F.R. §241.8, which purports to authorize immigration officers to make these determinations, is in conflict with, and thus *ultra vires* to, the statute providing for an immigration judge hearing, INA §240(a).

The Court's analysis is soundly based on fundamental principles of statutory construction and does not conflict with other reinstatement-related decisions of this Circuit. Although Respondent contends that the Court's decision conflicts with the First Circuit's decision in *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004), this

contention is misleading. Significantly, the *Lattab* Court's analysis conflicts with Supreme Court's more recent decision in *Clark v. Martinez*, _U.S. __, 125 S.Ct. 716 (Jan. 12, 2005). Moreover, the *Lattab* decision is factually distinguishable from *Morales-Izquierdo*.

In addition, the *Morales-Izquierdo* decision allows noncitizens a meaningful opportunity to exercise their statutory and due process rights before an immigration judge. Without the threat of summary removal within hours or days, individuals who claim to be U.S. citizens or who claim they are not subject to INA §241(a)(5) are now afforded a reasonable opportunity to assert and develop such claims before immigration judges.

To give but one example, because Felipe Pablo Brickey (A36 626 111) could not be summarily removed within "a day" due to this Court's decision in *Morales-Izquierdo,* he is now able to assert and develop his claim to derivative U.S. citizenship (based on his now deceased father having been a U.S. citizen) before the Immigration Court in Phoenix, Arizona.[1] *Compare Batista v. Ashcroft*,

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[1] Mr. Brickey was initially charged with reentry after deportation under INA § 276, U.S.C. § 1326. *See U.S. v. Brickey-Cordova*, case no. CR 03-620 (D. Ariz.). The government ultimately moved to dismiss the charges with prejudice. The District Court granted the motion and the charges were dismissed with prejudice on January 24, 2005. Mr. Brickey's defense attorney informed undersigned counsel that the government moved to dismiss the charges only after Mr. Brickey demonstrated the merits of his derivative citizenship claim to the government's satisfaction. Nonetheless, Mr. Brickey was released from criminal custody to immigration custody. But for the *Morales-Izquierdo* decision, Mr. Brickey would

270 F.3d 8 (1st Cir. 2001) (requiring case transfer to district court under INA §242(b)(5)(B), 8 U.S.C.§1252(b)(5)(B) to resolve genuine issue of fact regarding citizenship claim made by individual subject to reinstatement under §241(a)(5)).

Additionally, individuals applying to adjust their status to lawful permanent residence are now able to have their adjustment applications adjudicated in accordance with *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788 (9th Cir. 2004) provided they requested a waiver of their prior order before the reinstatement determination. Furthermore, individuals who contend that they qualify for a statutory or judicial exemption from INA §241(a)(5)[2], that their prior order was illegal[3] or that their entry was legal[4] should now have the opportunity to obtain

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have been subject to imminent removal. Instead, Mr. Brickey will present his citizenship claim before an immigration judge. It is expected that the removal charges against him will be dismissed.

[2] *See, e.g. See Castro-Cortez et al. v. INS,* 239 F.3d 1037(9th Cir. 2001) (individuals who entered the United States illegally before April 1, 1997 are not subject to reinstatement); Legal Immigration Family Equity Act, §1104(g), Pub. L. 106-554, 114 Stat. 2763 (2000) ("LIFE Act") (legalization applicants for adjustment of status under INA §245A); LIFE Act §1505(a)(1) (Nicaraguan and Cuban applicants for adjustment of status under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)); LIFE Act §1505(b)(1) (applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998); LIFE Act § 1505(c) (Salvadoran, Guatemalan, and Eastern European special rule cancellation applicants under NACARA § 203).

[3] *See, e.g. Luna-Trujillo v. Ashcroft*, 2005 U.S. App. LEXIS 366 (9th Cir. Jan. 10, 2005) (unpublished) (petition for rehearing pending) (petitioner contended that prior expedited removal order was unlawful; petition for review granted in light of *Morales-Izquierdo*); *De Sevilla v. Ashcroft*, Case No. 03-72549 (challenging legality of prior expedited removal order); *Hurtado-Martinez v. Ashcroft*, Case No. 02-73749 (same).

counsel, present evidence on their behalf and cross-examine the evidence against them in a due process hearing before an impartial immigration judge. Moreover, this Court will have the benefit of a fully developed administrative record -- including the immigration judge/Board of Immigration Appeals' expertise on these issues -- when conducting judicial review of a reinstatement order.

AILF is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. AILA is a national association of lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance and cultivate the administration of law pertaining to immigration, nationality and naturalization and to facilitate the administration of justice. AILF and AILA have a direct interest in ensuring that Respondent fairly, fully and accurately implement regulations that achieve the Congressional intent of providing immigrants a meaningful opportunity to contest the applicability of §241(a)(5) to them through a full and fair hearing before a neutral decision-maker.

II. ARGUMENT

A. THE COURT CORRECTLY HELD THAT 8 C.F.R. §241.8 IS ULTRA VIRES TO INA §240(a).

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[4] *Mustafa v. Ashcroft*, Case No. 04-71371 (challenging charged illegality of reentry). *See also Castro-Cortez*, 239 F.3d at 1041 (confirming Petitioner Castro-Cortez' claim that he was not previously deported and his re-entry was not illegal).

The Court properly examined the texts of INA §§240(a) and 241(a)(5) and compared them to the reinstatement regulation. Respondent's efforts to convince this Court that it failed to compare INA §§240(a) and 241(a)(5) and misread INA §240(a)'s "exclusivity provision" are unavailing. Moreover, these contentions are particularly suspect, given that Respondent did not previously raise them. Rather, these assertions are nothing more than post-hoc rationalizations, raised for the first time in the rehearing petition.[5]

Contrary to Respondent's suggestion, the Court did not misapprehend or overlook the plain language of INA §§240(a) and 241(a)(5). Rather, the decision closely examines the text of both provisions. *See, Morales-Izquierdo*, 388 F.3d at 1301-03. As the Court noted, INA §240(a) "unambiguously" indicates that immigration judges must make all removability determinations unless specified elsewhere. *Id.* at 1303.

Congress enacted clear procedural rules for every form of removal, including expedited removal, INA §235(b), 8 U.S.C. §1226(b), expedited removal of terrorists, INA §235(b), 8 U.S.C. §1226(c), administrative removal for non-permanent residents convicted of an aggravated felony, INA §238(b), 8 U.S.C. §1228(b), judicial removal, 8 U.S.C. §1228(c), alien terrorist removal, 8 U.S.C.

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[5] *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 857 n.35 (9th Cir. 2003) ("We normally defer to an agency's interpretations of its own regulations, but we may decline to defer to the *post hoc* rationalizations of appellate counsel.") *citing Martin v. OSHRC*, 499 U.S. 144, 150 (1991).

§1531 et seq., and regular removal proceedings, INA §240, 8 U.S.C. §1229a. Given the procedural clarity found elsewhere in the statute, the Court was correct to find that Congress did not provide more procedural rules and protections for terrorists and non-permanent residents with aggravated felonies than for people subject to reinstatement.

As this Court found, Congress intended the procedures which had always applied to reinstatement to continue to be applied, rather than delegating authority to create a procedure which affords no hearing, no impartial adjudicator, no ability to present or cross-examine evidence and/develop a factual record before the agency, and no meaningful access to counsel. Congress is presumed to know that the INS had interpreted its predecessor reinstatement provision (former INA §242(f)) to require a hearing before issuance of a reinstatement order and is deemed to have intended, therefore, that the reinstatement determinations would continue to be made by an immigration judge. *See Castro-Cortez et al. v. INS*, 239 F.3d 1037, 1052 (9th Cir. 2001) ("congressional silence is instructive."); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1139 (9th Cir. 2000) ("We presume that Congress knows the law.").

Reinstatement proceedings under INA §241(a)(5) are not distinct from removal proceedings under INA §240. Like removal proceedings, reinstatement proceedings require a removability determination, regardless of whether the text of

§241(a)(5) authorizes the adjudication of charges of inadmissibility or deportability. Significantly, former INA §242(f) did not contain language authorizing the adjudication of charges of exclusion or deportability and the regulations implementing that statute specifically required immigration judges to determine deportability under INA §242(f).[6]

Second, Respondent erroneously claims that INA §240's reference to immigration judges and INA §241(a)(5)'s reference to the "Attorney General" is somehow significant. However, INA §241(a)(5) and former INA §242(f) both refer to the "Attorney General." As Congress was well aware that the agency had interpreted the "Attorney General" to include the immigration judges (8 C.F.R. §242.23 (1995)), its retention of the term "Attorney General" in INA §241(a)(5) suggests that Congress intended reinstatement determinations to continue being made by immigration judges.[7]

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[6] *See* 8 C.F.R. §242.23(a)(1995) ("In the case of an alien within the provision of section 242(f) of the Act, the order to show cause shall charge him with *deportability* under section 242(f) of the Act."), (b)(". . . proceedings under section 242(f) of the Act shall be conducted in general accordance with the rules prescribed in this part."), (c)("In determining the *deportability* of an alien [under former INA §242(f)]"), (d)("If *deportability* as charged in the order to show cause is established, . . .") (emphasis added).

[7] Moreover, the Attorney General, as head of the Department of Justice, has jurisdiction over immigration judges but no longer has jurisdiction over immigration officers. In 2002, Congress enacted the Homeland Security Act of 2002 ("HSA"), Pub. L 107-296, 116 Stat. 2135 (Nov. 25, 2002). The HSA abolished the former INS and transferred responsibility for the detention and removal of non-citizens to a newly established Department of Homeland Security.

Finally, Respondent fails to acknowledge that three factual predicates (and not simply the existence of a prior order) must be established before a reinstatement order can issue: a prior lawful order,[8] departure under that order, and subsequent illegal reentry. The facts of several cases decided already by this Court (*e.g. Castro-Cortez, supra, Arreola-Arreola v. Ashcroft*, 383 F.3d 956 (9th Cir. 2004), *infra*) including Petitioner's case, and currently pending before this Court (see n. 3 and n. 4, *supra*) have demonstrated that these predicates may involve complex legal issues requiring the in-depth knowledge of immigration statutes, regulations and court decisions possessed by immigration judges, not low-level immigration officers.

In sum, the Court did not overlook or misapprehend any question of fact or law and thus Respondent's rehearing request should be denied.

B. THE SUPREME COURT'S RECENT DECISION IN *MARTINEZ v. CLARK* AFFIRMS THE *MORALES-IZQUIERDO* COURT'S CONCLUSION AND UNDERMINES THE LATTAB COURT'S ANALYSIS.

HSA §§ 101, 102, 402, 441, 451, 455, 456. The Executive Office for Immigration Review, which encompasses the Board of Immigration Appeals and the immigration courts, remains under the direction of the Attorney General within the Department of Justice. HSA § 1101.

[8] *Arreola-Arreola*, 383 F.3d at 963 (". . ., because the constitutionality of a reinstatement order depends on whether an alien was afforded all the process to which he or she was entitled in the prior removal proceeding, the INS cannot reinstate a prior order of removal that did not comport with due process.").

In *Clark v. Martinez*, _U.S. __, 125 S.Ct. 716 (Jan. 12, 2005) the Supreme Court held that its decision in *Zadvydas v. Davis,* 533 U.S. 678 (2001), prohibiting the indefinite detention of admitted aliens under INA §241(a)(6), 8 U.S.C. §1231(a)(6), also applied to another category of aliens (non-admitted aliens) subject to detention under the same provision. *Martinez*, 125 S.Ct. at 722-23. The Court instructed that courts must apply the canon of constitutional avoidance when deciding between two plausible readings of a statute, one of which raises constitutional concerns.[9] Significantly, the majority explained that the canon must be applied "whether or not [] constitutional problems pertain to the particular litigant before the Court." *Martinez*, 125 S.Ct. at 724.[10]

The *Martinez* Court's instruction -- that courts must apply the canon of constitutional avoidance even if the statute is not unconstitutional *as applied to the litigant* – is relevant here because it demonstrates the critical flaw in the *Lattab* Court's analysis. *Martinez'* instructs that an as-applied constitutional challenge is not a prerequisite to invoking the canon of constitutional avoidance. However, the

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[9] *Martinez*, 125 S.Ct. at 724 ("It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."). *See also* 125 S.Ct. at 733 ("The canon is not a method of adjudicating constitutional questions by other means.").

[10] *See also Martinez*, 125 S.Ct. at 725 ("We find little to recommend the novel interpretive approach advocated by the dissent, which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case.").

Lattab Court refused to consider the canon in its analysis because Petitioner Lattab did not contend that the reinstatement procedures espoused in 8 C.F.R. §241.8 were unconstitutional *as applied to him.*[11] (Here, Petitioner Morales-Izquierdo contends that the reinstatement procedures are unconstitutional as applied to him).

Had the *Lattab* Court applied the doctrine of constitutional avoidance and the rule of lenity (as subsequently instructed by the Supreme Court's decision in *Martinez*), it would have struck down the regulation at 8 C.F.R. §241.8 as unreasonable. Indeed, the First Circuit said that if Petitioner Lattab had alleged that the reinstatement procedures prejudiced him, "that doubtless would affect our judgment on the second step of the *Chevron* pavane. An interpretation of a statue that is unconstitutional, is by definition unreasonable." *Lattab*, 384 F.3d at 20 n.5 (emphasis added).[12]

The *Lattab* Court expressly left "open the possibility that the rule of avoidance might lead to a different statutory construction." *Id.* Given the *Lattab* Court's recognition that "[t]he summary reinstatement process offers virtually no procedural protections," 384 F.3d at 21, n.6, the only conclusion

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[11] *Lattab*, 384 F.3d at 20 & n.5 ("...since, in all events, we do not reach the constitutional question, . . ., we have no occasion to . . .[consider whether]. . . the rule of avoidance might lead to a different statutory construction.").

[12] The court also could have struck down the regulation as contrary to Congressional intent. One judge on the panel questioned whether application of the canon of constitutional avoidance would change the court's conclusion as to the *first* step of the statutory construction analysis. 348 F.3d at 20, n.5.

consistent with this finding is that the reinstatement procedures present serious constitutional problems.

The *Lattab* Court should have interpreted 8 C.F.R. §241.8 to avoid Constitutional doubt, and held that the regulation is *ultra vires* as this Court properly concluded. Even assuming *arguendo*, however, that a petitioner must raise an as-applied due process challenge to the reinstatement process before invoking the rule, Petitioner Morales-Izquierdo's case presents such a challenge. Thus, the *Lattab* Court "doubtless" would have reached a different result if it were presented with Petitioner Morales-Izquierdo's case.

Accordingly, there is no actual conflict with *Lattab* that would warrant rehearing.

C. *MORALES-IZQUIERDO* IS CONSISTENT WITH SUPREME COURT AND NINTH CIRCUIT CASE LAW

The *Morales-Izquierdo* Court did not find it necessary to apply the canon of constitutional avoidance and rule of lenity. However, had the Court also applied these statutory construction rules, it would have reached the same conclusion: that Congress did not provide for INA §241(a)(5) to be implemented by immigration officers. Thus, the decision is consistent with *Martinez* and other precedent decisions within this Circuit.

In *Castro-Cortez et al. v. INS*, 239 F.3d 1037, 1040 (9th Cir. 2001), the court expressed "serious doubt" that the reinstatement procedures comported with due

process.[13] Similarly, in *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 965 (9th Cir. 2004), the court found that petitioner raised "a colorable constitutional claim" that the reinstatement procedures violated due process as applied to him. Applying the canon of constitutional avoidance, the *Arreola-Arreola* Court interpreted INA §241(a)(5)'s bar to review "to avoid such concerns." *Id.* at 964. Thus, this Court already has acknowledged the serious constitutional problems presented by 8 C.F.R. §241.8 and has invoked the canon of constitutional avoidance with respect to INA §241(a)(5).[14]

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[13] *Castro-Cortez*, 239 F.3d at 1040 ("we seriously doubt that the government's new reinstatement procedure comports with the Due Process Clause"); at 1048 ("The reinstatement process raises very serious due process concerns, and is caused not by a change mandated by Congress as part of IIRIRA, but by an administrative decision to amend the regulations governing reinstatement proceedings in the wake of IIRIRA"); at 1049 ("we have serious doubt whether the use of Immigration Officers to determine whether to reinstate removal orders comports with due process"). *See also Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 960, n.5 (9th Cir. 2004) (discussing problems in the reinstatement procedures regarding the right to counsel, ability to development of an administrative record, notice of the right to judicial review ability exercise).

[14] *Morales-Izquierdo* is also consistent with *Castro-Cortez* and *Arreola-Arreola* Courts concerns regarding INS' unilateral change to the reinstatement procedures. *See Castro-Cortez,* 239 F.3d at 1048, n. 13 ("Had Congress intended to change the reinstatement procedures by eliminating the alien's right to appear before an IJ and contest the reinstatement order, it undoubtedly would have done so."); *Arreola-Arreola*, 383 F.3d at 961 (". . .*Congress* did *not* otherwise make significant changes to the reinstatement statute. The *INS*, however, significantly altered *its* interpretation of the reinstatement statute and revised its regulation . . . to eliminate the alien's right to an administrative hearing before issuing a reinstatement order.") (Emphasis added).

Furthermore, *Morales-Izquierdo* is not in tension with *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1174 (9th Cir. 2001). The *Alvarenga-Villalobos* Court held that a "second" reinstatement hearing is not *constitutionally* required only when the litigant does *not* raise an as-applied challenge to INA §241(a)(5). The court's holding is inapposite to *Morales-Izquierdo*. First, the *Morales-Izquierdo* Court considered whether a second hearing is *statutorily* required. Second, *Martinez* teaches that the canon of constitutional avoidance must be invoked *whether or not* the litigant raises an as-applied constitutional challenge.

Thus, the Court's decision does not conflict with Supreme Court or Ninth Circuit precedent and rehearing is not warranted on this basis.

D. THE ALLEGED "IMPACT" OF THE DECISION ON RESPONDENT IS NOT RELEVANT TO THE COURT'S STATUTORY CONSTRUCTION ANALYSIS.

Respondent contends that the Court's opinion should be reexamined because of the impact it may have on enforcement policies. Simply stated, however, policy issues are completely irrelevant to the statutory construction analysis courts must undertake. If Respondent disagrees with this Court's interpretation of Congressional intent, its proper recourse would be for it to petition Congress for legislative amendment. *See Firstland Int'l, Inc. v. United States INS*, 377 F.3d 127, 132 (2nd Cir. 2004) ("If the INS is correct that our interpretation of [the

statute] will place significant burdens on the agency, the agency's recourse is to petition Congress to amend the statute").

Even assuming *arguendo* that policy contentions were relevant, Amici believe that Respondent overstates the impact of the decision. There are numerous other means by which the agency can both achieve its enforcement objectives and respect the statute as Congress wrote it. For example, Respondent could, by regulation or internal policy, give expedited treatment to the scheduling of reinstatement proceedings before immigration judges[15] or offer pre-hearing voluntary departure under INA §240B(a), 8 U.S.C. §1229c. Furthermore, the statute expressly precludes protracted removal proceedings. After an IJ determines that an individual is subject to INA §241(a)(5), the individual is "not eligible and may not apply for any relief." Thus, the hearing, and any appeal thereof, would be limited to whether the person whether the individual meets any of the judicial or statutory exemptions to INA §241(a)(5)[16] and, if not, whether the person was subject to a prior lawful removal order, departed under that order, and reentered illegally.

Finally, Respondent's claim that the value of the stricken regulation is that summary removal "can be accomplished in one day" (Petition at 10, 18) highlights

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[15] *See, e.g.*, INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (mandating immigration judge review in expedited removal cases within 7 days).

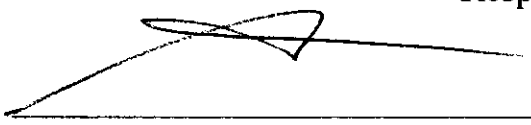
[16] *See* n. 2, *supra* (setting forth exemptions).

Amici's concern that the stricken regulation provides no meaningful opportunity for an individual to obtain counsel and contest an immigration officer's reinstatement determination. Surely individuals who claim to be U.S. citizens, to qualify for an exemption to INA §241(a)(5), to have been previously subject to an unlawful removal order or departure, or to have lawfully reentered may need more than one day to develop their claim. Moreover, if the claim involves a legal question, immigration officers, who are untrained in the intricacies of immigration statutes and regulations and applicable court interpretations, are simply not qualified to make the determination.

III. CONCLUSION

For the foregoing reasons, the petition for panel rehearing should be denied.

Respectfully submitted,



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